

L. L. Plumbing & Heating Co., Inc. and U.A. District Council No. 12 on Behalf of Plumbers Locals 86, 209 and 299 and the U.A. District Council No. 12 Plumbers Welfare Fund, U.A. District Council No. 12 Plumbers Pension Fund, U.A. District Council No. 12 Plumbers Annuity Fund, U.A. District Council No. 12 Plumbers Vacation and Holiday Fund, and U.A. District Council No. 12 Plumbers Education Fund. Case 2-CA-24476

March 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

Upon a charge filed by U.A. District Council No. 12, the Union, on July 10, 1990, the General Counsel of the National Labor Relations Board issued a complaint June 27, 1991, against L. L. Plumbing & Heating Co., Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. On August 13, 1991, the Respondent filed a letter from Riccardo Tedesco, the Respondent's president, in answer to the complaint.

On November 12, 1991, the General Counsel filed a Motion for Summary Judgment. On November 18, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its letter in response to the complaint, the Respondent admits that it has failed to make certain contractually required contributions to the union funds. However, the letter failed to specifically admit, deny, or explain the allegations in the complaint as required by Section 102.20 of the Board's Rules and Regulations and does not therefore constitute a valid answer. Despite being advised repeatedly in writing and by phone calls by counsel for the General Counsel that its letter was insufficient to constitute an answer, the Respondent failed to file an answer. Thus, by failing to file a sufficient answer, all the allegations contained in the complaint are deemed to be true. *View Heights Convalescent Hospital*, 255 NLRB 76 (1981).

Assuming for argument's sake that the Respondent's August 13, 1991 letter is sufficient to serve as an answer to the complaint, the Respondent admits that it owes the moneys alleged in the complaint, but asserts that it has been financially unable to make the contributions to the union funds. It is well established,

however, that financial inability to pay is not an adequate defense to an ongoing failure to make contractually required fund payments. See *Air Convey Industries*, 292 NLRB 25 (1988).¹ The Respondent's claim, therefore, is without merit and provides no defense to its admitted actions.

Accordingly, in the absence of good cause being shown, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation with an office and place of business in Thornwood, New York, is engaged as a plumbing and heating contractor in the building and construction industry. In the course and conduct of its business operations, the Respondent annually purchases and receives at its Thornwood facility products, goods, and materials valued in excess of \$50,000 directly from other enterprises located within the State of New York, each of which other enterprises had received the said products, goods, and materials directly from points outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All journeymen plumbers and apprentices employed by Respondent, but excluding office clerical employees, guards and supervisors as defined in the Act.

At all material times here, the Union has been the designated exclusive collective-bargaining representative of the unit and the Union has been recognized as that representative by the Respondent. Recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period July 1, 1989, to June 30, 1992. The Union, by virtue of Section 8(f) of the Act, has been, and is, the limited exclusive representative of the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

¹ In Member Oviatt's view there may be limited circumstances, not present here, in which an employer's inability to make contractually required payments to union benefit funds may be a defense to an allegation that it unilaterally and unlawfully withheld the payments. See his dissent in *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991).

The most recent collective-bargaining agreement requires the Respondent to make contributions to the Union's Welfare Fund, Pension Fund, Annuity Fund, Vacation and Holiday Fund, and Education Fund, due and payable no later than 10 days after the last day of the month during which the wages of employees employed in the unit have been paid. The most recent collective-bargaining agreement also requires the Respondent to furnish monthly reports regarding its obligations to the Funds. The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects of bargaining. Since January 13, 1990, the Respondent has failed and refused to make payments to the Funds in a timely manner and has failed and refused to submit, or has submitted in an untimely manner, the monthly reports to the Funds. For the months from May 1990 to October 1990, the Respondent failed to make any contributions to the Funds as required under the current collective-bargaining agreement. By engaging in the conduct described above without the consent of the Union, the Respondent has unilaterally modified the terms of the collective-bargaining agreement. By these acts and conduct, the Respondent has failed and refused to bargain collectively with the representative of its employees, and thereby has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

CONCLUSION OF LAW

By refusing to bargain with U.A. District Council No. 12, on behalf of Plumbers Locals 86, 209, and 299, by failing and refusing to make contractually required contributions to the union funds or by making contributions in an untimely manner, and by failing and refusing to furnish contractually required reports or by furnishing them in an untimely manner, without the Union's consent, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make timely contributions to the union funds and to submit the required reports to the union funds in a timely fashion. We shall also order the Respondent to furnish the contractually required reports to the union funds that it failed to furnish in the past and to make whole its unit employees by making all contributions to the union funds that have not been paid and that would have

been paid in the absence of the Respondent's unlawful discontinuance of the payments, with any other sums applicable to the payments to be computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). We shall also order the Respondent to make the unit employees whole for any losses they may have suffered as a result of its failure to make the contractually required fund contributions, *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, L. L. Plumbing & Heating Co., Inc., Thornwood, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with U.A. District Council No. 12, on behalf of Plumbers Locals 86, 209, and 299, as the limited exclusive bargaining representative of the employees in the bargaining unit.

(b) Failing and refusing to adhere to the terms of the collective-bargaining agreement with the Union by failing and refusing to make contractually required contributions to the union funds or by making such contributions in an untimely manner, and by failing and refusing to furnish contractually required reports to the union funds or by furnishing them in an untimely manner, without the Union's consent. The unit is:

All journeymen plumbers and apprentices employed by Respondent, but excluding office clerical employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the contractually required reports to the union funds.

(b) Make whole its unit employees by making the contractually required contributions to the union funds that have not been paid and that would have been paid absent the Respondent's unlawful discontinuance of payments, and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such required contributions, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(d) Post at its facility in Thornwood, New York, the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to bargain with U.A. District Council No. 12, on behalf of Plumbers Locals 86, 209, and 299, as the limited exclusive representative of the employees in the bargaining unit.

WE WILL NOT fail and refuse to adhere to the terms of our collective-bargaining agreement with the Union by failing and refusing to make contractually required contributions to the union funds or by making such contributions in an untimely manner, and by failing and refusing to furnish contractually required reports to the union funds or by furnishing them in an untimely manner, without the Union's consent. The unit is:

All journeymen plumbers and apprentices employed by Respondent, but excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the contractually required reports to the union funds.

WE WILL make whole our unit employees by making all contractually required contributions that have not been paid and that would have been paid absent our unlawful discontinuance of payments, and by reimbursing our unit employees for any expenses ensuing from our failure to make such required contributions.

L. L. PLUMBING & HEATING CO., INC.